New Silver Palace Restaurant *and* Hon Kong Lok *and* 318 Restaurant Workers Union. Cases 2–CA–30820, 2–CA–31742, and 2–CA–31774

June 18, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On August 30, 1999, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed exceptions. The Respondent filed an answering brief to the General Counsel's exceptions and the General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt his recommended Order as modified and set forth in full below.[2]

Applying *Wright Line,*[3] the judge concluded that the Respondent violated Section 8(a)(3) and (1) by refusing to hire the 23 discriminatees, finding that the Respondent's alleged reasons for not hiring them were pretextual. The Respondent excepts, asserting, in part, that it lawfully did not hire the discriminatees because they did not meet its requirement that they speak English, failed to submit applications, or had not fully complied with the requirements for submitting applications, which included completing the forms in English and listing prior employment.

At a postbankruptcy auction on July 24, 1997,[4] the Respondent, New Silver Palace Restaurant, purchased the assets of the Silver Palace Restaurant, whose employees had been represented by the Union. After the auction, the Union sent the Respondent's owners, Richard Chan and Jonathan Chiu, letters on behalf of the former Silver Palace Restaurant employees seeking employment with the Respondent. In subsequent discussions, Chiu told union advisor Wing Lam among other things, that he would hire only a minority of the Union's people, and the Respondent's supervisor, Kwong Yau Cheng, told Lam that they would hire any number of former employees if there was no demand for the Union. We agree with the judge that Chiu's statement violated Section 8(a)(1). The Respondent does not except to the judge's finding that Cheng's statement was unlawful. As found by the judge, the Respondent deliberately prevented the Union from gaining a foothold in its restaurant partly by using employment applications to avoid hiring union supporters and to give the impression that its refusals to hire were lawful. As a result, the Respondent refused to hire any of the discriminatees.[5]

We find that the evidence discussed above and set forth by the judge[6] amply supports the judge's finding

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent did not except to the findings that it violated Sec. 8(a)(1) through: Kwong Yau Cheng's statements to Wing Lam that they would hire any number of union supporters if there were no demand for the Union and that the Respondent would hire old Silver Palace employees if the Union did not seek to represent them, as found by the judge in par. 37 of his decision; Yuk Yin Law's statement to Fung Yee Chen that it was "no use" to picket and if she continued to do so, she would not be hired, as found in par. 45; and the counterdemonstrators' threat to kill the families of union leaders, physically harm the union pickets, and engage in unspecified reprisals, and engaging in photographic and video surveillance of the pickets, as found in par. 90.

[2] The General Counsel has excepted to the judge's omissions in his recommended Order of standard compliance provisions concerning the preservation of documents for examination and certification of compliance and a provision ordering that the notice be posted in Chinese as well as English. We find merit in these exceptions and shall modify the Order and issue a new notice accordingly. We have also modified the language of the Order to conform more closely to the violations found.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[4] All dates hereafter are in 1997, unless otherwise noted.

[5] Concerning the application process, the judge found in par. 75 of his decision that the Respondent decided in advance to separate applications into three stacks for: union supporters whose applications were incomplete and therefore could be rejected; loyal applicants whose applications could be corrected if incomplete to enable the Respondent to hire them; and union applicants who complied with the requirements and therefore could not be rejected outright. The evidence, most notably the credited testimony of Howard Chiu, the son of Jonathan Chiu, supports the judge's description of the Respondent's separation of the applications into three stacks. However, there is no evidence that the Respondent made the decision to separate the applications in advance of their submissions. Similarly, the judge mistakenly found, also in par. 75 of his decision, that Richard Chan told Jonathan and Howard Chiu, with regard to their review of one union supporter's application, that they could not "really reject this guy, so he's on the waiting list" because he had properly filled out his application. The evidence reflects that Hau Moon Leung, who was in charge of the Respondent's hiring, made the statement. These minor factual errors do not affect our decision affirming the judge.

[6] Several of the Respondent's exceptions to the judge's factual findings in connection with his finding the unlawful refusals to hire have some merit but no impact on our finding that the Respondent unlawfully refused to hire the discriminatees. For example, with regard to the Respondent's use of English applications, the judge stated in par. 64 that none of the employees or supervisors spoke or understood English. As asserted by the Respondent, one individual who was hired, Hon Ping Kong, read part of his application in English at the hearing (but testified in Chinese); one discriminatee who worked for the Respon-

that the Respondent violated Section 8(a)(3) and (1) by refusing to hire the 23 discriminatees. In this regard, consistent with our decision in *FES,* 331 NLRB 9, 10 (2000), we find that the Respondent was hiring at the times it refused to hire the discriminatees,[7] the discriminatees had experience or training relevant to the announced or generally known requirements for the positions, and antiunion animus was a motivating factor in the decision not to hire them. We also agree with the judge that the Respondent has failed to rebut the General Counsel's strong showing that the reasons advanced for not hiring the discriminatees were pretextual.[8]

The Respondent also excepts to the judge's finding that it violated Section 8(a)(1) through Supervisor Yuk Yin Law's statements to individuals conditioning their consideration for employment on their payment of $5000 each for a share in the business. In late June, Yuk Yin Law asked discriminatee Poon Git Woo whether there had been a union meeting and what was discussed at the meeting; Woo replied that they had discussed getting jobs at the Respondent's restaurant when it reorganized. Law replied that there was "no use" in such a meeting and that if they wanted jobs they would have to pay the Respondent money. In July, Law renewed his demand that Woo pay money to gain employment and stated that the Respondent was afraid the workers would make trouble for the Respondent.[9]

In early August, during the same meeting in which Law directed discriminatee Tae Hung Wan to tell another discriminatee, Fung Yee Chin, to cease her union support and activities, Law told Wan that he would have to pay $5000 to Respondent for a share in the business to be hired. Thus, the Respondent linked its demand for payments in exchange for consideration for jobs to its simultaneous demand that potential employees cease union activities. In this context, we agree with the judge that the purpose of the demanded payment was to insure the potential employees' loyalty to the Respondent as opposed to the Union.[10] Accordingly, we agree with the judge that Law's statements to Woo constitute unlawful interrogation and coercion to cease his union activities and support. We further agree that Law's statements to Wan constitute unlawful implied threats that employees would not be hired unless they ceased their union activities and support of the Union. The same is true as to Law's statements to Woo, although the judge did not expressly so characterize the violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, New Silver Palace Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union support or activities.

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dent's predecessor, Poon Git Woo, testified largely in English; and one supervisor demonstrated some ability in English. The Respondent refused to hire Poon Git Woo, however, although he apparently met the requirement of being an English speaker. Moreover, there is no credited evidence that the Respondent made any effort to determine whether the applicants spoke English.

Similarly, the Respondent asserts that the judge improperly found in par. 67 that "virtually all" of the restaurant's customers were Chinese. The Respondent's supervisor, Yuk Yin Law, testified that about 90 percent of them were Chinese.

The Respondent also correctly asserts that the judge erred in finding, in pars. 25 and 74, that Richard Chan owned or controlled 67 percent of the Respondent's shares. There is inconsistent testimony on this matter. Howard Chui testified that Chan held 50 percent of the total of 124 shares and Jonathan Chui held the other 50 percent, with Chan holding proxies for the shares he sold. Wing Lam and Trinh Duong (who attended meetings with the Respondent to assist Lam) testified that Jonathan Chui told them that Chan owned a majority of the shares, with Duong testifying that he was told that Chan owned 67 out of 124 shares, equaling (incorrectly) a 51-percent interest. Wing Lam testified that Jonathan Chiu told him that Chan controlled over "sixty some" percent of the shares and Jonathan Chiu only controlled 37 percent. In any event, the possibility that Chan owed or controlled 50 percent of the Respondent rather than 67 percent, as found by the judge, has no impact on our finding of violations herein.

[7] We find it unnecessary to pass on the Respondent's exception to the judge's finding in par. 50 that the Respondent hired 35 individuals, rather than 31, as found by the judge in par. 50. The Respondent relies on a stipulation at the hearing that the Respondent had hired 31 applicants by the date of the restaurant's opening. In any event, we find that the General Counsel has met his burden under *FES* of showing that the number of open positions exceeded the number of discriminatees who sought, or would have sought absent the Respondent's unlawful conduct, work in the positions for which they had relevant training or experience. *FES,* supra at 10. We also note that most of the discriminatees had worked for the Respondent's predecessor for at least 2 years whether or not the judge, in par. 48, correctly characterized them all as "long-term" employees.

[8] Chairman Hurtgen agrees as to the 8(a)(3) violations. However, he does not agree that these 8(a)(3) violations operate as a forfeiture of a successor employer's right to set new initial terms and conditions of employment. See his dissenting opinion in *Pacific Custom Materials,* 327 NLRB 75 (1998).

[9] As the Respondent notes in its exceptions, Poon Git Woo testified that the first of these conversations with Law occurred in late June and the second in July, rather than, as the judge found in par. 40 of his decision, "on or about July 24" (the date of the auction) and a week or two later, respectively.

[10] Similarly, the Respondent's vice president, Foon Szeetu, told Lam in negotiations that the other investors were worried about the Union and would feel "safer" if the employees invested their own money in the Respondent. In that meeting, it was the Respondent's representatives who sought economic concessions from the Union, including the sharing of tips with management, rather than the Union seeking concessions from the Respondent, as stated by the judge in par. 21 of his decision.

(b) Informing employees that they would have to pay money in order to become employed by the Respondent because of their union membership or activities.

(c) Informing employees that they would have to abandon their union memberships or activities in order to be employed by the Respondent.

(d) Promising employees jobs if they cease their union membership or activities.

(e) Informing employees that only a minority of the Respondent's work force would be union members.

(f) Informing employees that they would not be hired by the Respondent or other employers because of their union membership or activities.

(g) Threatening employees that it is futile for them to support the Union or engage in union activities.

(h) Informing employees they would have been hired by the Respondent if they were not members of the Union and/or do not engage in union activities.

(i) Engaging in photographic and video surveillance of employees' union activities.

(j) Making unspecified threats of reprisals against employees because of their union membership or activities.

(k) Impliedly threatening to kill union officials and their families.

(l) Inflicting damage on the property of union pickets because of their union membership or activities.

(m) Threatening to inflict bodily harm on employees because of their union membership or activities.

(n) Inflicting bodily harm on employees because of their union membership or activities.

(o) Refusing to recognize and bargain collectively with 318 Restaurant Workers Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time dining room employees including waiters, busboys, and dim sum girls, employed by the Employer excluding all kitchen employees, office clerical employees, captains, managers, guards and supervisors as defined in the National Labor Relations Act.

(p) Unilaterally changing and implementing changes to the terms and conditions of employment of its unit employees, without affording the Union an opportunity to bargain with the Respondent with respect to such changes.

(q) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to:

Yau Mei Chang	Bi Zhen Li
Yu Hui Chang	Guo Chang Liang
Fung Yee Chen	Kin C. Ng
Yau May Cheng	Yam Ping Ou
Wing Gay Cheung	Siu Mui Chu Sit
Hsing Lieh Chou	Sing Song Tse
Jian Wei Feng	Tak Hung Wan
Bill S. Hui	Pak Sum Wong
Chit Cheung Lam	Siu Nin Wong
Kow Chau Lau	Poon Git Woo
Yem Chou Lau	Guo Quan Yan
Moon Tong Leung	

jobs that they applied for, or would have applied for, had it not been for the Respondent's refusal to employ them, or if such jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any rights or privileges previously enjoyed.

(b) Within 14 days of this Order, offer Hon Kong Lok full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges to which he would have enjoyed.

(c) Make whole the employees set forth in subparagraphs 2(a) and (b) of this Order in the manner set forth in the remedy section of this decision, from the date of the refusal to employ them, or in the case of Hon Kong Lok, from the date of his discharge, until the date of a valid offer of employment or reinstatement.

(d) Within 14 days of this Order, remove from its files any reference to the unlawful refusal to employ the employees named above in subparagraph 2(a) and within 3 days thereafter, notify them in writing that this has been done and that these personnel actions will not be used against them in any way.

(e) Within 14 days of this Order, remove from its files any reference to the unlawful discharge of Hon Kong Lok, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) Within 14 days of this Order, recognize and, upon request, bargain with the 318 Restaurant Workers Union and put in writing and sign any agreement reached on terms and conditions of employment for bargaining unit employees.

(g) On request of the Union, rescind any unilateral changes in the terms and conditions of employment existing prior to the opening of the New Silver Palace Restaurant, and retroactively restore preexisting terms and conditions of employment, and make whole the bargain-

ing unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes, as set forth in the remedy section of this decision, from on or about August 26, 1997, until the Respondent negotiates with the Union in good faith to impasse or agreement.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[11] Copies of the notice, in English and Chinese, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate any of you about your union support or activities.

WE WILL NOT inform you that you have to pay money in order to become employed by us because of your union membership or activities.

WE WILL NOT inform you that you have to abandon your membership in, and or activities on behalf of the Union in order to be employed by us.

WE WILL NOT promise you employment with us conditioned on your ceasing your union membership or activities.

WE WILL NOT inform you that only a minority of our work force would be union members.

WE WILL NOT inform you that you would not be hired by us or other employers because of your union membership or activities.

WE WILL NOT threaten you that it is futile to support the Union or engage in union activities.

WE WILL NOT inform you that we would not have hired you if you were union members or engaged in union activities.

WE WILL NOT engage in photographic and video surveillance of your union activities.

WE WILL NOT make unspecified threats of reprisals against you because of your union membership or activities.

WE WILL NOT impliedly threaten to kill union officials and their families.

WE WILL NOT inflict damage upon the property of union pickets because of their union membership or activities.

WE WILL NOT threaten to inflict bodily harm on you because of your union membership or activities.

WE WILL NOT inflict bodily harm on you because of your union membership or activities.

WE WILL NOT refuse to recognize and bargain collectively with 318 Restaurant Workers Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time dining room employees including waiters, busboys, and dim sum girls, employed by us excluding all kitchen employees, office clerical employees, captains, managers, guards and supervisors as defined in the National Labor Relations Act.

[11] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT unilaterally change and implement changes to the terms and conditions of employment of unit employees, without affording the Union an opportunity to bargain with us with respect to such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to:

Yau Mei Chang	Bi Zhen Li
Yu Hui Chang	Guo Chang Liang
Fung Yee Chen	Kin C. Ng
Yau May Cheng	Yam Ping Ou
Wing Gay Cheung	Siu Mui Chu Sit
Hsing Lieh Chou	Sing Song Tse
Jian Wei Feng	Tak Hung Wan
Bill S. Hui	Pak Sum Wong
Chit Cheung Lam	Siu Nin Wong
Kow Chau Lau	Poon Git Woo
Yem Chou Lau	Guo Quan Yan
Moon Tong Leung	

jobs that they applied for, or would have applied for, had it not been for the Respondent's refusal to employ them, or if such jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Hon Kong Lok full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges to which they would have enjoyed.

WE WILL make whole the employees set forth in subparagraphs 2(a) and (b) of this Order, plus interest, from the date of the refusal to employ them, or in the case of Hon Kong Lok, from the date of his discharge, until the date of a valid offer of employment or reinstatement.

WE WILL, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to employ the employees named above in subparagraph 2(a) and notify them in writing that this has been done and that these personnel actions will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Hon Kong Lok, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL on request, bargain with the 318 Restaurant Workers Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL on request of the Union, rescind any unilateral changes in the terms and conditions of employment existing prior to the opening of the New Silver Palace Restaurant, and retroactively restore preexisting terms and conditions of employment, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes, plus interest, from on or about August 26, 1997, until the Respondent negotiates with the Union in good faith to impasse or agreement.

NEW SILVER PALACE RESTAURANT

Gregory R. Davis, Esq. and *Matthew Bodie, Esq.,* for the General Counsel.

Clifford P. Chaiet, Esq. (Naness, Chaiet & Naness) and *Hugh H. Mo, Esq.,* for the Respondent.

Yvonne Brown, Esq. (Gladstein, Reif & Meginniss,), for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on various dates between August 5, 1998, through January 28, 1999, in New York, New York.

Pursuant to charges filed by 318 Restaurant Workers Union (the Union), and by Hon Kong Lok a consolidated complaint issued against the New Silver Palace Restaurant (Respondent) on November 20, 1998, alleging violations by Section 8(a)(1), (3), (4), and (5) of the Act.

On the entire record in this case, including my observation of the demeanor of the witnesses and careful consideration of briefs submitted by counsel for the General Counsel, counsel for the Union, and Respondent, I make the following findings of fact and conclusions of law.

Respondent is a New York corporation with an office and place of business in New York, New York, where it is engaged in the operation of a restaurant. Respondent annually derives gross revenues in excess of $500,000. Respondent annually purchases and receives at its New York facility goods and products valued in excess of $5000, directly from points located outside the State of New York.

It is admitted, and I find that Respondent is an employer, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent has denied the labor organization status as the Union.

Credible and uncontradicted testimony by Kwong Hui, the Union's president, established that the Union is an organization of restaurant worker employees, which has been in existence since at least 1980. It holds regular meetings in which employees take part. The Union's current secretary and treasurer are

both former employees of the old Silver Palace, and alleged discriminatees in this case.[1]

The alleged discriminatees also participated in the Union's picketing of Respondent described below. The Union's current president, Kwong Hui, testified that the purpose of the Union is to represent its employee-members in collective bargaining with employers such as the old Silver Palace and Respondent.

The Union had a series of collective-bargaining agreements with the old Silver Palace Restaurant and attempted to negotiate another agreement just prior to the restaurant's closing. Prior to Respondent's opening, the Union sent a letter suggesting that Respondent consider union members for employment. The Union continues to represent its employee members, including the alleged discriminatees, in its labor dispute with Respondent. The Union filed the underlying charge in this case and has maintained a picket line against Respondent.

Respondent denied the Union's status as a labor organization within the meaning of Section 2(5) of the Act. Respondent contends the Union does not represent employees as defined in Section 2(3) of the Act.

The facts establish that the Union represented the old Silver Palace's employees pursuant to a collective-bargaining agreement. Moreover, they continue to represent approximately 29 of the old Silver Place employees who applied for employment with Respondent. The Union demanded Respondent recognize it as the collective-bargaining representative of its new employees and that it hire all the former old Silver Palace employees who applied for jobs with Respondent.

A labor organization is defined in Section 2(5) of the Act as an organization in that which "employees participate" and which exists for the purpose in "whole or in part, of dealing with employers concerning wages, hours, and other conditions of employment." It is clear in the instant case these conditions are all met.

Respondent contends the Union is defunct because none of its current members are employed. In *Brislgeport Fittings, Inc. v. NLRB,* 877 F. 2d 180 (2d Cir. 1989), the court concluded a union was not defunct because it had no constitution or bylaws or even had lost all its members, unless it was unwilling to represent employees. I find Respondent's contention without merit.

Respondent also contends the Union is not a labor organization within Section 2(5) because it is not democratic, i.e., that it lacks formal structure has no elected officers no constituting bylaws and also does not meet regularly. I conclude the Union's democratic processes are irrelevant to the union's status as a labor organization. *Electromation, Inc.*, 309 NLRB 990, 994 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994); *Alto Plastics Mfg. Corp.,* 136 NLRB 850, 853 (1962).

Respondent also contends that the Union existed as a "criminal enterprise," presumably on Respondent's counsel attempt to prove that Wing Lam, a union officer, had encouraged the employees of the old Silver Palace to file amended tax returns while working at the old Silver Palace. However, no witnesses examined by Respondent gave testimony in support of such contention. However, even if such contention were true, it would not offset the union status as a labor organization. *Alto Plastics,* supra.

Accordingly, I conclude the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Union represented the dining room employees at the Silver Palace Restaurant from 1980 until on or about May 29, 1997, the date the restaurant was closed by order of the Bankruptcy Court. At all material times, Kwong Hui was president of the Union and cofounder, Wing Lam, acted in an advisory capacity to the Union.

In *Ngan Gung Restaurant, Inc., d/b/a Silver Palace Restaurant*, Case 2–CA–26450, et al. (1996) (not reported in Board volumes), summarily affd. (April 1996), Administrative Law Judge Steven Fish found, inter alia, that the employer unlawfully unilaterally reduced the wages, hours, and other benefits to its employees, unlawfully demanded that manager share in tips, locked out employees, and threatened it would discharge employees, blacklist employees, close the facility, and/or file for bankruptcy. In his decision, Judge Fish noted that Richard Chan was the "Executive Director and member of the Board of Directors . . . and" "in effect its chief operating official who makes most of the important managerial decisions in the operation of the restaurant." ALJ p. 2, Ins. 27–33.

In January 1995, the restaurant filed for Chapter 11 bankruptcy protection and on December 8, 1995, the Bankruptcy Court appointed a trustee.

Subsequently, during the period from February through May 1997, the Union attended several meetings with the bankruptcy trustee, Henry Foong, the general manager appointed by Foong, Herbert Liu, and several potential investors, including Foon Szeetu, vice president of Respondent, Kok Hong Huie, head waiter of Respondent, and notably Richard Chan, the majority shareholder.

In separate negotiations, Union President Kwong Hui and union advisor, Wing Lam, asked for certain economic concessions from Richard Chan and Foon Szeetu, including the sharing of tips with management. Lam recalled that Szeetu stated that they wanted the employees to invest in the "New Silver Palace Group" because the other investors were worried about the Union and they would feel "safer" if the employees invested their own money.

The Union did not agree to the concessions demanded by the trustee and the investors and no successor collective-bargaining agreement was reached.

On May 29, pursuant to Chapter 7 of the Bankruptcy Act, the old Silver Palace was closed by order of the Bankruptcy Court. Thereafter, an auction of the assets was scheduled for July 24, 1997.

On July 24, pursuant to an agreement with Richard Chan, Jonathan Chiu purchased the assets of the Silver Palace Restaurant at auction.

Richard Chan, the majority shareholder of the old Silver Palace owned or controlled 67 percent of the shares in Respon-

[1] The old Silver Palace was a restaurant whose majority shares were owned or controlled by one, Richard Chan. As set forth in more detail below, the old Silver Palace went into Chapter 7 bankruptcy, and the assets were purchased by Richard Chan and others. The Union had represented the waiters, bus boys, and dim sum girls employed by the old Silver Palace.

dent's corporation. Jonathan Chiu owned or controlled about 33 percent of these shares.

On the day after the auction, Union President Kwong Hui sent Jonathan Chiu two letters. The first letter stated, in part:

> I am writing on behalf of the following former Silver Palace dining room employees who want to apply for employment at your restaurant at 46-50 Bowery. These workers are professional and experienced. Please call me at the above number to arrange interviews with these applicants.

The letter listed the names of 7 dim sum cart pushers, 3 busboys, and 19 waiters/waitresses.

On July 30, a meeting between Respondent and the Union was held at the Saigon Bar and Restaurant in Chinatown. Present on behalf of the Respondent were Jonathan Chiu, Howard Chiu, Plant Managers Foon Szeetu, and Jonathan Chiu's brother-in-law, Kwon Yau Cheng, an admitted supervisor within the meaning of 2(11) of the Act. Wing Lam was present on behalf of the Union. Employees and union members Fung Yee Chen, Yu Hui Chang, Guo Chang Liang, and Yem Chau Lau were also present.

Wing Lam opened the meeting by stating that Union President Kwong Hui had asked him to appear on behalf of the Union and the employees to find out whether the employees could be hired by Respondent. After Jonathan Chiu acknowledged receipt of the letter containing the Union's list of prospective employees Lam stated that such employees all formerly employed by the old Silver Palace were very experienced and knowledgeable about the restaurant and its customers and asked that Respondent hire all of them.

Jonathan Chiu replied that Respondent was a new entity, an "equal opportunity" employer and that their hiring decisions would be based on applications. Chiu stated that he wanted to hire people who spoke English and asked that Lam refer such people to him. When Lam contested Respondent's need for English-speaking employees, Chiu explained that he wanted to attract more "Western" customers and that he would get a third party to test the applicants.

Lam stated that he heard Respondent had already hired everyone and that Han Fu Cheng, a former manager of the old Silver Palace Restaurant, had solicited $5000 in exchange for such jobs.

Jonathan Chiu admitted that Han Fu Cheng was a shareholder and that he was in charge of the dining room but denied Respondent had hired anyone else. Cheng is an admitted supervisor within the meaning of Section 2(11) of the Act. Chiu said he would hire a "minority" of the Union's people and suggested 40 percent. Lam did not agree. Chiu upped his offer to 50 percent of the persons on the Union's list, 10 waiters and 5 dim sum women. Chiu further stated that Lam could choose such employees himself, that they did not need to fill out "any form" and he would hire the other employees "from the outside." Lam refused Chiu's proposal and urged him to consider hiring more of the persons on the Union's list. Lam suggested that they meet again.

During the discussion between Lam and Chiu, Kwong Yau Cheng stated: "That's all you ask for? How about the Union?" On being reassured that Lam and the employees were not there to demand the Union, Cheng replied: "If that was the case, no matter how many, that's not a problem, you know, if you [do] no demand a union, there will be no problem to hire any number of you." Later, as they were leaving the meeting, Cheng repeated this remark to Wing Lam, stating, "Look, if no union I will hire any number, if that's okay to you."

After the meeting, Wing Lam called Jonathan Chiu and Kwong Yau Cheng on separate occasions to arrange another meeting between the parties. However, neither Chiu nor Cheng agreed to meet again.

It is clear that the Union, the former employees of the old Silver Palace and Respondent's supervisors and principals knew with certainty that Chan and Chiu were going to purchase the assets of the old Silver Palace and run the same operation under the name of the New Silver Palace. Thus, the meetings described above were preliminary discussions with the Union as to the conditions under which Respondent would hire the old Silver Palace employees.

The Board has held that an employer's statement that he intends to hire a fixed percentage of union employees is a violation of Section 8(a)(1). Thus, Jonathan Chiu's statement that Respondent would hire only a minority of the old Silver Palace employees is a clear refusal to hire employees because of their activities and support of the Union and is a violation of Section 8(a)(1).

I also find Kwong Yau Cheng's statement made with the express authorization of Jonathan Chiu that Respondent would hire old Silver Palace employees only if the Union did not seek to represent them as a clear refusal to hire employees because of their activities and support of the Union and a violation of Section 8(a)(1).

Even before Jonathan Chiu and Richard Chan purchased the assets of the old Silver Palace Restaurant, the testimony of the alleged discriminatees shows that Yuk Yin Law called many of them at home to discourage them from supporting the Union and told them they would not be hired at the new restaurant if they continued to support Wing Lam and the Union.[2]

The below-named employees credibly testified that Yuk Yin Law, an admitted supervisor, had the following conversations with them.[3]

Busboy Poon Git Woo it was credibly testified that on or about July 24, after Respondents meeting with the Union, Law telephoned him and asked him whether there was a union meeting and what was discussed at that meeting. Woo told him they had discussed getting jobs at Respondents operation when it reorganized. Law told him that there was "no use" in such a meeting, and if they wanted a job with Respondent, they would have to pay money to Respondent.

A week or so later, Law again telephoned Woo and renewed his demand of money from Woo to gain employment with Re-

[2] The facts of this meeting is based upon the credible and unrebutted testimony of Wing Lam, Yu Hui Chang, and Guo Chang Liang.

[3] As set forth in detail below, I conclude Law is not a credible witness. I discredit his entire testimony, except where he makes admissions against Respondent's interest. I credit General Counsel's witnesses concerning their conversations with Law. I was impressed with their demeanor. Moreover, their testimony was detailed, corroborated by other employees, and consistent on cross-examination.

spondent stating that "they," an obvious reference to Respondent, were afraid the workers would make trouble for Respondent. Payment of money was to insure their loyalty.

I conclude that Law's questions to Woo about what took place at the union meeting constitutes unlawful interrogation in violation of Section 8(a)(1), *Hoffman Fuel Co.,* 309 NLRB 327 (1992). I also conclude that Law's demand that Woo would have to pay money to get a job was intended to coerce Woo to abandon his activities and support for the Union, in violation of Section 8(a)(1).

On July 31, Fung Yee Chen, a dim sum server previously employed by Respondent, testified that Law called her at home and asked her why she had attended the union meeting with Jonathan Chiu and then told her that if she continued to support the Union she would not be hired. I conclude Law's questioning as to Chen's presence at the union meeting constitutes unlawful interrogation in violation of Section 8(a)(1). *Hoffman FueI,* supra. I also conclude that Law's statements to Chen that it would be useless to support the Union and she would not be hired because of her union activities are threats to abandon the Union, and threats that she would not be hired because of her activities on behalf of the Union. See *Wellstream Corp.,* 313 NLRB 698, 706 (1994).

Sometime in the beginning of August, Tae Hung Wan, a waiter who had filed an application for employment with Respondent, met with Law. Law told him in order to be hired he would have to pay $5000 to Respondent for a share in the business in order to be hired by Respondent. Law additionally told Wan that he should tell Fung Yee Chen, a dim sum server, to cease her activities and support of the Union. I find such statements implied threats that employees would not be hired unless they ceased their activities and support of the Union, in violation of Section 8(a)(1).

On or about September 21 after the Union began picketing, as described below, Fung Yee Chen credibly testified that Law saw her on a street near Respondent's restaurant and told her it was "no use" to picket, that following the Union would do her no good, and that if she continued to picket she would not be hired constitute a threat of unspecified reprisal, and a threat that she would not be hired unless she ceased her activities and support of the Union in violation of Section 8(a)(1).

In the first few days of August, Respondent placed a job advertisement in the Sing Dao Daily News, a Chinese newspaper, and distributed job applications, which were written in English although none of the employees nor Respondent's supervisors spoke or understood English. The applications were available at the restaurant, which was undergoing renovation at the time.

During the first week of August, the alleged discriminatees went to the restaurant, were given a blank application, in English, and were told that they should return it within a day or two. Most of the applicants were also told that they should attach a picture to the application. No other instructions were given.

After picking up the application forms, most of the alleged discriminatees went to the Union for assistance in filling out the applications. These applicants only listed their names, addresses, the positions applied for, and their employment history at the old Silver Palace Restaurant. Out of the 18 alleged discriminatees who actually submitted applications, only Pak Sum Wong and Yam Ping Ou filled in the section of the application entitled "work references." Some employees failed to fill in the blank requesting the name of their prior employer, which in all cases was the old Silver Palace. All of the 23 alleged discriminatees were long-term employees of the old Silver Palace. The same is true as to the supervisors of Respondent.

On returning to the restaurant, the alleged discrimatees either handed their applications to someone or placed them in a box on a counter inside the restaurant.

Respondent received 91 applications, filled out in whole or in part, and hired 35 of the applicants. None of the applicants, whose name was on the Union's July 25 letter to Respondent indicating those employees, namely the 23 alleged discriminatees alleged in the complaint who wanted employment by Respondent, was given employment. As set forth above, 18 of those 23 applicants had filled out and returned their applications to Respondent.

On August 10, General Manager Howard Chiu sent a letter to 16 of the applicants who filled out an application stating their applications were denied because "necessary elements requested within the application was [sic] incomplete." Two other applicants, Pak Sum Wong and Yam Ping Ou, were issued another form letter, dated August 14, which stated that their applications were placed on a waiting list for "future reference."

Five alleged discriminatees—Guo Chang Liang, Kin Ng, Poon Git Woo, Tak Hung Wan, and Siu Nin Wong—did not submit applications.

Guo Chang Liang, a former waiter at the old Silver Palace Restaurant, credibly testified that he went to the New Silver Palace Restaurant the first week of August and asked Howard Chiu for an application. Chiu said that there were no more available. When Liang asked whether there would be any applications available the next day, Chiu stated the applications were "all finished." Liang stated that he did not return to the restaurant because he thought Chiu was simply making an excuse not to make the applications available to him. I conclude that Chiu did not intend to give Liang an application.

After the auction, Kin C. Ng credibly testified that he was invited to a meeting, set forth and described above by King Yang Lee, a waiter later hired by Respondent. Also in attendance were Jonathan Chiu, Yuk Yin Law, Hon Ping Kong, Kok Hong Huie, Tony Lee, and King Kei Mui.

Ng credibly testified that at the meeting Jonathan Chiu—said that if you are a union member you would not be hired. Ng also recalled that Jonathan Chiu stated $5000 would have to be paid for "shareholding adversity" for a job. Subsequently, Ng stated he went to the restaurant and asked Yuk Yin Law for a job application. Law told him they had used all the application forms but that he could come back and pick up a form the next day. Two days later, Ng returned to the restaurant but was told by Yuk Yin Law that there were no applications available. I conclude Ng did not make further attempts to fill out an application, because he felt it would be futile.

As discussed supra, prior to the auction Poon Git Woo testified that Yuk Yin Law called him on two occasions and stated that he and the others attending the union meetings were not

going to be rehired unless they put in money. Woo stated Law said the money was needed because they were afraid the workers would make trouble and the restaurant would be destroyed. After Woo became aware Respondent was accepting applications for employment, he stated that he did not submit an application because he did not have the money for a job and because Yuk Yin Law told him that when "you joined a Union . . . nobody was going to employ you." I conclude Woo made no attempts to fill out an application because it would be futile.

In the beginning of August, Wan handed his application to Yuk Yin Law at the New Silver Palace Restaurant. Law stated he would speak to the investors for him but that a picture was required on the application, and handed the application back to him. Two or three days later, Wan credibly testified that he spoke to Yuk Yin Law near the restaurant and that Yuk Yin Law told him $5000 was needed for a share in the business. At that time, Wan testified that Law further stated that he should tell Fung Yee Chen not to help the Union. Although he had a picture for the application, Wan testified that he did not return the application because of Law's statements against the Union and because he did not want to pay $5000 for a job.

I conclude that but for Respondents conduct, each of these employees would have filled out an application.

Section 8(a)(3) of the Act prohibits employers from discriminating against employees in regard to hire, tenure or any term or condition of employment in order to discourage membership in any labor organization. In order to establish a prima facie violation of Section 8(a)(3), it must be shown that the employee was engaged in union activity, that the employer had knowledge of such activity, that the employer exhibited animus or hostility toward said the activity, and that the employee's protected activity was a "motivating factor" in the employer's decision take adverse action against the employee. See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Once a prima facie case has been established, the employer has the burden of showing that the same action would have been taken place even in the absence of protected conduct. Id; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). An employer cannot meet that burden simply by showing that it had legitimate reasons for its actions but must persuade the trier of fact that such actions would have occurred even in the absence of protected conduct. *Pacific Custom Materials, Inc.*, 327 NLRB 7 (1998).

However, where the evidence shows the employer's asserted reasons for its actions are pretextual, i.e., they do not exist or were not relied on, the Board is justified in concluding that the pretextual reason was asserted to mask its unlawful reason. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Board has unequivocally held that the *Wright Line* standard governs "refusal-to-hire" cases, such as the one at bar. *Champion Rivet Co.*, 314 NLRB 1097 (1994).

The facts establish that restaurants in New York's "Chinatown" do not use applications to hire employees. Ads are placed in local Chinese newspapers, and those employees interested in jobs apply in person. New York's "Chinatown" is a very tight community.

The applications themselves were a cynical joke, which revealed Respondent's determination not to hire union applicants. The applications were printed in English, a language which none of the 91 applicants, nor Respondent's supervisors understood. Respondent might just as well have printed the applications in Hebrew or Latin.

Respondent's refusal to hire the 18 union applications because they lacked a picture or the name of their prior employer, or list references is blatantly pretextual. All the union applicants had worked at the old Silver Palace for years along with Respondent's supervisors, some of whom were unit employees. The application procedure was in itself a pretext.

I conclude Yuk Yin Law, and Hau Moon Leung, Respondent's supervisors who supposedly received, and reviewed the union applications, if they were reviewed at all, knew these applicants personally, that their prior employer was the old Silver Palace, and that their references were Respondent's supervisors with whom they had worked with for years. I conclude the failure to hire any of these union applicants is clearly pretextural. This is further conclusively established by the fact that every nonunion applicant who was hired required Respondent's supervisory assistance in order to fill in all the blanks.

Respondent also contended that some union applicants were not considered because they did not speak enough English and Respondent wanted to expand its virtually 100-percent Chinese customers to include English speaking customers. I find this contention both laughable and pretextual. At the trial Respondent customers were still virtually 100-percent Chinese.

Haw Moon Leung testified that he refused to hire certain of the alleged discriminatees because their work was not satisfactory. I discredit Leung since these employees were longtime employees at the old Silver Palace whose work was never questioned before. Moreover, since the whole application process was intended to avoid hiring union supporters and Leung was in on this conspiracy. I conclude he is not a credible witness. I therefore discredit all his testimony except where there is an admission against Respondent's interest.

The facts establish Respondent's knowledge, animus, and an admission by Respondent's vice president and minority owner of a refusal to hire the employees who were employed at the old Silver Palace and were active and supporters of the Union. This is established by the July 30 meeting, described above, where Jonathan Chiu told Wing Lam, the union representative, in the presence of several alleged discriminatees that Respondent would not recognize the Union as the collective-bargaining representative for Respondent and would not hire union supporters to insure that the Union never achieved a majority status.

Yuk Yin Law's 8(a)(1) statements to the alleged discriminatees especially those conditioning consideration for employment on paying $5000 for a share in the business further establishes Respondent's unlawful motive.

It is crystal clear that the General Counsel has established an exceptionally strong case showing Respondent's refusal to hire the alleged discriminatees was discriminatorily motivated.

Respondent contends primarily it did not hire the alleged discriminatees because they did not fill out their applications properly or failed to submit applications. As set forth above, I

find such contention pretextual. My finding is the same as to employees who were not hired because they could not speak English.

Thus, given nothing else, I would conclude that Respondent's refusal to hire the alleged discriminatees was a clear violation of Section 8(a)(1) and (3) of the Act.

However, in this case there is an admission that Respondent executed a complex plan, centered around its phony application procedure to avoid hiring the alleged discrimatees. Howard Chiu, Respondent's general manager, testified that Richard Chan, the principal owner in the old Silver Palace, and the principal owner (66 shares) in Respondent met with him and his father, Jonathan Chiu, vice president and minority owner (33 shares) of Respondent. Chan stated he felt that the Union put him out of business with the old Silver Palace, and he was not going to recognize the Union as the representative of Respondent. Chan stated he was going to use employment applications to avoid hiring union supporters and still give the impression that his refusal to hire union supporters was within the law.

It was decided to require all applicants to fill out written applications. Each applicant was required to affix a picture to his application. This requirement was to enable Hau Moon Leung, who was in charge of hiring, to be able to pick out the union supporters at a glance. Before the application forms were distributed it was decided to prepare three stacks of applications submitted. One stack for union supporters whose applications were incomplete, even to the smallest detail. These applicants would be rejected for failure to complete the application properly. A second stack was for those former old Silver Palace employees who were considered loyal to Respondent, and other applicants in the community who were known by Richard to be loyal to Respondent. If these employees failed to fill out their application forms properly Respondent would help them cure the defects by helping them fill out the defects or getting supervisors to fill out the omitted blanks. The third stack was for those union supporters who did fill out their applications properly. They were to be placed on a waiting list. But as Richard Chan told the Chiu's, "We can't really reject this guy, so he's on the waiting list and let them wait."

Howard Chiu's testimony was corroborated by Wing Lam, who met with Jonathan Chiu. Lam credibly testified that Jonathan Chiu told him he wanted to settle the instant case. Chan did not. That Chan used his majority ownership status to vote out Chiu as the vice president as of September 1.

I credit entirely Howard Chiu's testimony. Notwithstanding his termination, along with that of his father on September 1, while this trial was in progress, Chiu's testimony was so detailed and consistent under scathing and intense cross-examination of Respondent's counsel that I conclude it simply has the ring of truth. Therefore, I also find Lam's testimony concerning his conversation with Richard Chan to be credible and admission against Respondent.

For the reasons set forth above and the admissions hearing, I conclude that Respondent's refusal to hire the alleged discriminatees is a violation of Section 8(a)(1) and (3).

The evidence establishes that when Respondent opened its doors for business it employed 35 unit employees. The unit represented by the Union at the old Silver Palace was:

> All full-time and regular part-time dining room employees including waiters, busboys and dim sum girls, excluding all kitchen employees, offices, clerical employees, captains, managers, guards and supervisors as defined in the Act.

Since 1980, the Union had a series of collective-bargaining agreements with the Union concerning the above bargaining unit. The last collective bargaining expired on March 31, 1997.

On May 29, the date the old Silver Palace Restaurant closed, the mandatory subjects of bargaining contained in the most recent collective-bargaining agreement between the Union and the old Silver Palace Restaurant were in effect. In part, that agreement provided that "tipped" employees, waiters and busboys were paid the applicable minimum wage plus, $0.70 while dim sum servers were paid no less than $7.84 per hour. The agreement also provided that employees with greater than 3 years of service received 2 weeks of vacation and those with greater than 5 years received 3 weeks of vacation. All employees were granted six holidays and received health insurance contributions by the old Silver Palace Restaurant. Moreover, numerous witnesses testified that at the time the old Silver Palace Restaurant closed, managers and other "black jacketed" (supervisory) head waiters did not receive tips.

The record shows that on opening the restaurant, Respondent paid its dining room employees lower wage rates, provided fewer vacation and holidays, and did not provide any health insurance benefits. Respondent stipulated that its waiters and busboys are merely paid the applicable minimum wage rate, $3.15 while dim sum servers are paid only $5.15 per hour. Respondent further stipulated that it pays only 1 week of vacation and provides no holidays or health insurance coverage. In addition, Respondent's records show that Managers Hau Moon Leung, and Howard Chiu, as well as, Supervisory Head Waiters Yuk Yin Law, Kok Hong Huie, and Tse Yu Cheung received a portion of the tips, which was contrary to the practice established at the old Silver Palace Restaurant prior to its closure by the Bankruptcy Court.

It is settled Board law that a successor employer must recognize and bargain with a union when it hires a "substantial and representative" compliment of employees, the majority of which are the predecessor's employees who were represented by the Union. *NLRB v. Burns Security Services,* 406 U.S. 272 (1972); *Fall River Dyeing Corp.,* 482 U.S. 27 (1987).

In determining whether such a bargaining obligation is present, the Board examines a number of factors, including: (1) whether there has been a substantial continuity of the same business operation; (2) whether the new employer uses the same plant; (3) whether the alleged successor employs the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the same supervisors exist; (6) whether the same equipment and methods of production exist; and (7) whether the same product or services are offered.

In the case at bar, it is clear that Respondent is a successor employer. It is engaged in the operation of a Chinese restaurant at the same facility occupied by the predecessor employer, the old Silver Palace Restaurant. As discussed above, at a minimum, the record shows that Respondent would have hired the

29 dining room employees listed by the Union in its letter of July 25 to Respondent absent its unlawful conduct. Inasmuch as Respondent initially hired 31 dining room employees, it is clear that Respondent would have employed substantially the same work force as the predecessor employer. Moreover, the evidence shows that its principal managers/supervisors, Hau Moon Leung, Yuk Yin Law, Kok Hung Hie, and principal owner, Richard Chan, were employed by the predecessor employer. Thus, notwithstanding the bankruptcy of the predecessor, I conclude that Respondent is at the very least, a successor employer. See *Nephi Rubber Products Corp.*, 303 NLRB 151 (1991) (bankruptcy causing 16-month hiatus does not constitute essential change in business).

A successor employer may unilaterally set new terms and conditions of employment, unless it has "made it perfectly clear" that it plans to hire the predecessor's union employees as a majority of its workforce. *Spruce-Up Corp.*, 209 NLRB 194 (1974), enfd. 529 F.2d 516 (4th Cir. 1975). However, where an employer has unlawfully refused to hire employees in order to avoid recognizing a union, the Board has unequivocally declared that such an employer forfeits any right to unilaterally set the initial terms and conditions of employment of the affected unit employees and must "retroactively restore the terms and conditions of employment that existed under the predecessor's contract with the Union until such time as the Respondent and the Union bargain to agreement or to impasse, and to make whole the bargaining unit employees in a manner consistent with the contract's provision." *Galloway School Lines*, 321 NLRB 1422, 1427 (1996). See also *Carib Inn of San Juan*, 312 NLRB 1212 fn. 4 (1993); *U. S. Marine Corp.*, 293 NLRB 669, 672 (1989), enfd. 916 F.2d 1183 (7th Cir. 1990).

Here, the evidence establishes that Respondent changed the terms and conditions of employment by paying its dining room employees lower wage rates, providing fewer vacation and holidays, failing to provide any health insurance benefits, and requiring waiters and busboys to share tips with supervisory and managerial personnel, which was contrary to the practice established at the old Silver Palace Restaurant prior to its closure by the bankruptcy court. I conclude that by unlawfully failing to hire a majority of union employees and implementing such changes in the terms and conditions of employment for its dining room employees, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

On August 26, the grand opening of Respondent, the Union began picketing in front of the New Silver Palace Restaurant to protest Respondent's discriminatory hiring practices. Picketing has continued as of the close of this trial on January 28, 1999.

Almost immediately, Supervisory Head Waiter Yuk Yiun Law led a group of employees employed by Respondent, known as "counterdemonstrators" out of the restaurant and onto the sidewalk to respond to the union pickets. General Manager Howard Chiu joined the counterdemonstrators and helped Law hand out picket signs to the employees. According to numerous witnesses for the General Counsel, Law led the chanting of the counterdemonstrators, yelling that the union pickets were the "Lap dogs" of Wing Lam and that the families of Wing Lam and Kwong Hui would die.

In addition, the "counterdemonstrators" repeatedly threatened to kill the families of Kwon Hui and Wing Lam, made threats to inflict bodily harm upon the union pickets, made threats of unspecified reprisals, and engaged in photographic and video surveillance of the union pickets. I find all of these activities separate violations of Section 8(a)(1). See, e.g., *F. W. Woolworth Co.*, 310 NLRB 1197 (1993) (employer may not photograph or videotape picketers absent proper justification); *Refuse Compactor Service,* 311 NLRB 12 (1993) (threats of violence to picketers' families unlawful).

The record shows that these chants and other "counterdemonstration" activities continued almost daily, until approximately the end of October and that other managers and/or supervisory head waiters, such as Jonathan Chiu, Howard Chiu, Hau Moon Leung, Kok Hong Huie, and Tse Yu Cheung, also actively took part in the demonstrations.[4]

Around 11 a.m. on Sunday, October 11, 1998, the Union picketed once again in front of the New Silver Palace Restaurant. Four of the alleged discriminatees—Fung Yee Chen, Yau May Cheng, Yau Mei Chang, and Moon Tong Leung–took part in the picketing, along with several other supporters. The picketers had signs and a banner, and also placed a cardboard "coffin" on top of a small table. The coffin was decorated with slogans denouncing Respondent's treatment of union members; the signs and banner had similar messages. The picketers stood on top of the curb separating the sidewalk from the street, roughly 15 feet from the entrance.

Soon after the picketing began, King Kei Mui, a waiter for Respondent, and Chan Hung, Respondent's chief chef, came down from the restaurant to confront the picketers. Hung kicked the picketer's coffin, leaving part of it damaged. Both went back to the restaurant.

Five minutes later, Mui returned to the front of the restaurant with four other waiters, Chan Jor Louie, Hon Ping Kong, Kwan Chan, and Chiu Tong Ng, as well as, one of the kitchen workers. They brought out a large banner with them. All of the counterdomonstrators were on duty and wearing their uniforms. David Chin, a manager for Respondent, held the door open for the counterdemonstrators to exit the restaurant.

Three of the counterdemonstrators approached Yau Mei Chang, who had been distributing fliers at a nearby street corner. They angrily pointed at her and said that she was destroying their jobs. Frightened by the confrontation, Chang came back toward the other pickerters. Mui and Ng followed her back and then kicked the picketers' coffin to pieces. Fung Yee

[4] The principal witness concerning alleged illegal conduct by Respondent in connection with the pro union pickets were Union President Kwong Hui, and alleged discriminatees Fung Yee Chen, Yau Mei Chang, Yau May Cheng, and Moon Tong Leung. Their testimony was detailed and consistent under intensive cross-examination. I conclude their testimony was credible. Moreover, based on comparative demeanor considerations with Respondent witnesses, I find General Counsel's witnesses to be more credible. Further, in view of Respondent's systematic plan to avoid recognizing the Union, which included various threats to employees, a refusal to hire any union supporters, and instead hiring only employees who were loyal and responsive to Respondent position, I find that Respondent's witnesses who testified to the various picketing incidents described below were untruthful.

Chen kneeled down and tried to pick up the pieces of the coffin, but Ng forcefully grabbed her by the arm and shoulder. She told Ng that he was hurting her and threatened a lawsuit against him. Another of the discriminatees, Moon Tong Leung, came over to assist Chen. Ng scratched him on the arm, drawing blood.

During these events, Respondent's supervisors, Hau Moon Leung and David Chin, stood behind the glass doors of the restaurant and observed what was happening.

The police arrive soon after the confrontation, at which point Respondent's counterdemonstrators retreated back into the restaurant. Respondent's supervisor, David Chin, remained on the scene, however, to explain the counterdemonstrators' actions to police. Fung Yee Chen, whose arm was "swollen" and "shivering" from the pain, was sent to the hospital by ambulance and given tests.

The Union resumed picketing in front of the restaurant on Monday, October 19, around 6 p.m. Again, Fung Yee Chen, Yau Mei Chang, Yau May Cheng, and Moon Tong Leung were present, along with other supporters. They had the same banner, signs, and a new coffin.

Soon after the picketing began, King Kei Mui, Hon Ping Kong, Chan Hung, and three other kitchen workers came down from the restaurant to counterdemonstrate. Tim Chan, supervisor within the meaning of the Act, was also present, standing close to the doors of the restaurant. Holding a big banner, the counterdemonstrators rushed at the union picketers and began punching them from behind the banner. Mui grabbed a union supporter named Nelson by the neck and cut him with his nails. Another union supporter was grabbed by Chan Hung and dragged away from the restaurant. Hung flipped the supporter's jacket over his head and began beating him with his fists. Other counterdemonstrators joined in the beating. Maria, another union supporter, was also beaten up by one of the counterdemonstrators. The police arrived and arrested King Kei Mui, Chan Hung, and two other kitchen workers.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. This prohibition extends to acts of violence against employees or destruction of property that restrain or coerce employees. See *Pioneer Recycling Corp.*, 323 NLRB 652, 659 (1997); *M. A. Harrison Mfg. Co.,* 256 NLRB 427, 430 (1981).

On both October 11 and 19, Respondent counterdemonstrators physically assaulted union supporters resulting in bodily injury and destruction of property. During the violence by the Respondent counterdemonstrators on October 11, Respondent's supervisors, Daniel Chin and Hau Moon Lueng, were present and observed the acts of bodily injury and destruction of property. On October 19, Respondent's supervisor, Jim Chan, was present and observed the violent conduct again resulting in bodily injury and destruction of property.

The evidence establishes that during the entire course of picketing the counterdemonstrators has supervisory personal present on the picket line. Jonathan Chiu, Howard Chiu, Hau Moon Leung, and Yuk Yin Law engaged in photo and video surveillance and made various threats of unspecified threats, and threats to kill and bodily violence.

The evidence also establishes that during the violent picketing on October 11 and 19, described above, Yuk Yim Law was present, and Tim Chan actually inflicted bodily injury on the union pickets.

Under these circumstances, I find that Respondent's representatives, at the highest level, condoned, encouraged, and inflicted bodily harm on the union pickets as alleged, in violation of Section 8(a)(1) *Diamond National Glass Co.*, 317 NLRB 1048, 1050 (1995); *Great American Products*, 312 NLRB 962, 963 (1993).

Hon Kong Lok became employed by Respondent as a stock room clerk on August 26, 1997. Lok testified he was in charge of the warehouse, that he was a salaried employee, ordered meat from the wholesalers, and had authority to reject unfit food. Lok's supervisor was Hau Moon Leung.

Lok, Jonathan Chiu's brother-in-law, contacted Union Representative Wing Lam, at Jonathan Chiu's request to set up a meeting between Jonathan Chiu and Lam. The meeting took place on or about August 3, as described above.

On August 26, the Chinese newspaper, World Journal, printed an article concerning the details of the August 3 meeting and stated the meeting was "arranged by some relative," an obvious reference to Lok.

Two days after the article was published, Lok credibly testified that Manager Tse Yu Cheung asked Lok whether he was a union member. Lok replied that he participated in other associations in Chinatown.

On September 1, Lok credibly testified that Hau Moon Leung approached him in the storeroom and stated that Chiu was suspected to be "too pro-Union" and that they also suspected Lok was prounion. Lok did not reply whereupon Leung handed him his salary and stated that he was terminated.

As set forth above, I have concluded that Hau Moon Leung is not a truthful witness. I therefore do not credit his testimony with respect to Lok's termination.

It is clear that Lok set up the August 3 meeting with Wing Lam and Jonathan Chiu. It is also clear based on Lok's credible testimony concerning his conversation with Leung that Leung stated he was aware of Lok's setting up the August 3 meeting and that he was "pro Union" and then told him he was terminated. The World Journal news article indirectly referred to Lok as the individual who set up the August 3 meeting when it stated the meeting was set up by a close relative of Chiu. Clearly, Respondent knew Lok was Chiu's brother-in-law.

In view of Respondents other 8(a)(1) and (3) violations, and in view of Leung's "pro-Union" statement, immediately followed by Lok's termination without stating any reason, I find such termination to be a violation of Section 8(a)(1) and (3).

Since the union activity did not relate to filing of charges, giving testimony in Board procedures or relate to any Board related process, I do not find that Lok's discharge violated Section 8(a)(4) so alleged. In this regard, the Region was unaware of the private August 3 meeting. Such meeting was not part of the Board's processes.

Respondent contends that Lok is not an "employee" within the meaning of the Act because Jonathan Chiu is his brother-in-law.

Section 2(3) of the Act excludes "any individual employed by his parent or spouse" from the term "employee." Thus, by its literal terms Section 2(3) does not disqualify Lok as an employee under the Act. In fact, there is no case law to support the proposition that a close relative of the employer, other than a child or spouse, can be excluded from the protection of Section 8 of the Act solely because of familial status.

The Board has had the occasion, however, to interpret the scope of the term "employee" for the purposes of determining whether individuals are properly included in an appropriate bargaining unit under Section 9(b) of the Act. Even under such an analysis, the Board has generally found spouses and children to be "employees" where the managerial or supervisory relative owns less than a 50-percent interest in a corporation. See *NLRB v. Action Automotive*, 469 U.S. 490, 497 fn. 7 (1985). In most situations, the Board examines whether the close relative of an owner or shareholder enjoys special status or receives benefits or privileges not accorded other employees. Id. at 495–496; see, e.g., *Alois Box Co.,* 326 NLRB 1177 (1998); *T. K. Harvin & Sons,* 316 NLRB 510 (1995); and *M. C. Decorating, Inc.*, 306 NLRB 816 (1992): In this case, the brother-in-law of part owner was excluded where he recorded his own hours, submitted them directly to owner, and was not required to clock-in or out.

In the instant case, there is no evidence that Lok enjoyed special status or enjoyed special privileges due to his familial relationship to Jonathan Chiu.

Respondent employed Lok as a stock room clerk, a nonbargaining unit position. He testified that he was in charge of the warehouse, i.e., he ordered and inspected meat from wholesalers, and possessed the authority to reject unfit food, and to adjust incorrect orders.

He was paid $350 per week and his supervisor was Hau Moon Liung. There was no evidence Respondent employed other stock room clerks or that Lok supervised employees. Thus, even if Lok is examined under the usual "community of interest" analysis the Board employs in representation cases, there would be no basis to exclude him as not being an employee within the meaning of Section 2(3) of the Act. Nor is there any evidence Lok exercises the type of independent judgment which would render him to be a "supervisor" under the Act. See, e.g., *Lakeview Health Center*, 308 NLRB 75 (1992).

Respondent contends that Lok acted as a manager for Respondent and therefore is not an "employee" under the Act. The Board has defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp.*, 213 NLRB 851, 857 (1974). ("[M]anagerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.") Id.

I conclude Lok does not meet the requirements for being a managerial employee. Lok was in charge of the store or stock room. Lok would receive deliveries from food merchants and judge them with respect to price, quality, and weight. He did have the authority to reject an order if the quality was not good, and he had the authority to decide whether, if a shipment was less than was ordered, to change the delivery order or to have the merchant make up the difference later. However, Hau Moon Leung was in charge of placing the food orders; Lok played no role in this. Moreover, there is no evidence that Lok had any role in deciding how much food to order, what kinds of food to order, or from which merchants to order. Lok's role was essentially to check the food deliveries as they came in and make sure they met Respondent's price, weight, and quality specifications. Since Lok played no role in setting those specifications, I do not find him to be a managerial employee. See *Manimark Corp.*, 307 NLRB 1059, 1061 (1992), enf. denied on other grounds 7 F.3d 547 (6th Cir. 1993).

REMEDY

Having found that Respondent engaged in violations of Section 8(a)(1), (3), and (5) of the Act, I find that Respondent must be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

1. With respect to those employees that Respondent would have employed but for their membership in, and or activities on behalf of the Union, and with respect to its unlawful termination of Han Kong Lok, I recommend Respondent must be ordered to offer employment to those individuals to positions to which they applied for or would have applied for, had it not been for Respondents' unlawful refusal to employ them, or substantially equivalent positions, without prejudice to their seniority or any rights or privileges to which they would have enjoyed. With respect to Lok, I recommend Respondent must be ordered to reinstate him to his former position of employment, or a substantially equivalent position without prejudice to his seniority or any rights or privileges to which he previously enjoyed.

All of the above employees must be made whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with backpay extending from the date of the unlawful refusal to hire them, until the Respondent offers them employment. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). With respect to Lok, he must be made whole, as set forth above, from the date of his termination, until Respondent offers him reinstatement.

2. Respondent must be ordered to remove from their files any reference to the unlawful refusal to employ the employees named above including Lok, and notify them in writing that this has been done and that these personnel actions will not be used against them in any way.

3. Respondent must be ordered to recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of its employees in the unit found appropriate herein with regard to wages, hours, and other terms and conditions of employment; and if agreement is reached, embody it in a written and signed instrument; such appropriate unit is:

All full-time and regular part-time dining room employees including waiters, busboys, and dim sum girls, employed by Respondent excluding all kitchen employees, office clerical employees, captains, managers, guards and supervisors as defined in the National Labor Relations Act.

4. Respondent must upon the Union's request, rescind any departures from the terms and conditions of employment that existed prior to the opening of the New Silver Palace Restaurant, and retroactively restore preexisting terms and conditions of employment, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about August 26, 1997, until Respondent negotiates in good faith with the Union to agreement or impasse.

[Recommended Order omitted from publication.]